APPENDIX A

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 331—September Term, 1966.

(Argued February 21, 1967 Decided March 10, 1967.)

Docket No. 30907

UNITED STATES OF AMERICA,

Appellee,

—v.—

DANIEL MURPHY and ALBERT MENDES,

Appellants.

Before:

FRIENDLY, ANDERSON and FEINBERG,

Circuit Judges.

Appeals from judgments of conviction against defendants, labor union officials, for accepting payments of money from employers in violation of 29 U. S. C. §186 and 18 U. S. C. §2, in the United States District Court for the Southern District of New York, before Thomas F. Murphy, *Judge,* and a jury. Affirmed.

JOHN S. ALLEE, Assistant U. S. Attorney, Southern District of New York (Robert M. Morgenthau, U. S. Attorney, and Michael W. Mitchell, Assistant U. S. Attorney, Southern District of New York, on the brief), *for Appellee.*

JACOB W. HELLER, Esq., New York, N. Y. (Heller & Dretzin and Moses L. Kove, Esq., New York, N. Y., on the brief), *for Appellants.*

ANDERSON, *Circuit Judge*:

The appellants, Daniel Murphy and Albert Mendes, were respectively the financial secretary and business agent of a local union of the International Association of Bridge, Structural and Ornamental Ironworkers, AFL-CIO. They were found guilty by a jury of having willfully violated §302 of the Taft-Hartley Act[1] (29 U. S. C. §186) by receiving payments[2] of money from four employers who were engaged in the business of fabricating and erecting iron and steel structures and whose employees were members of the local union. Both appeal from the judgments of conviction entered on the verdicts.

The points raised on appeal concern statements made by the prosecutor in his summation to the jury, which the appellants assert were inflammatory and prejudicial. We conclude that, although the remarks complained of were examples of a lack of restraint which more competent

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[1] 29 U. S. C. §186 in pertinent part provides:

"(a) It shall be unlawful for any employer . . . to pay . . . any money or other thing of value—

* * * * *

(2) to any labor organization, or any officer or employees thereof, which represents . . . any of the employees of such employer . . .

* * * * *

(b)(1) It shall be unlawful for any person to . . . receive . . . any payment . . . prohibited by subsection (a) . . .

* * * * *

(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor . . ."

[2] Certain excepted payments have no application to the present case.

prosecutors are careful to display, they were not so prejudicial as to call for a new trial, and we affirm.

The Government's case rested almost entirely upon the testimony of the four employers who told of making payments, totalling approximately $5000, to the appellants, as charged. On direct examination it was disclosed that they themselves, though ordinarily liable to prosecution under the statute, had been granted testimonial immunity by the Department of Labor. The accused took the stand and categorically denied ever receiving any payment from any of these four employers or any other employers. Neither side offered any substantial corroborating evidence.[3] The issue presented to the jury was largely one of the credibility of the four employers, on the one hand, and the two union officials on the other.

The appellants argue that in this posture of the case inflammatory statements by the prosecutor were likely to have very damaging consequences. They point to three instances in the course of the prosecutor's argument in which, they assert, he overstepped permissible bounds.

The first of these was when he said,

> "Well, why were these union officials treated differently from the other people who got liquor? Or, to state the question another way, 'Why—why were these so-called Christmas payments made?'

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[3] The Government presented one witness who had delivered envelopes to the union's office, but he did not know the contents of the envelopes. The Government also produced some "records" of payments; however, these documents did not name the payees, and were fragmentary at best.

Appellants presented six character witnesses to testify as to appellants' reputation for truthfulness and honesty.

> A Christmas payment is usually $5, a bottle of liquor, $10. These really weren't Christmas payments. They took the form of Christmas payments, but they were something else. Here we are talking about roughly $5,000 for a four-year period from four employers. And how many other employers did these union officials represent?"

It is the appellants' claim that the prosecutor was, in so saying, suggesting that the accused were engaged in a shakedown which involved many employers in addition to the four concerned in the case. Although it would have been better if the assistant district attorney had not rhetorically asked, "And how many other employers did these union officials represent?", when defense counsel objected, Judge Murphy, to confine the jury's attention and consideration to the specific offenses charged, promptly instructed the jury as follows:

> "Gentlemen, the issue in this case is contained within the indictment that is charged. These men are accused of these 17-odd crimes here and that is our only problem: Are they guilty or not guilty of those charges, and nothing else."

This was sufficient to overcome any prejudice which may have stemmed from the prosecutor's questions. Compare *United States* v. *Caruso*, 358 F. 2d 184, 186 (2 Cir. 1966); *United States* v. *Stromberg*, 268 F. 2d 256, 271 (2 Cir. 1959); *United States* v. *Courtney*, 257 F. 2d 944, 947 (2 Cir. 1958).

The second instance of which the appellants complain is another portion of the summation for the Government where, they say, the prosecutor charged the accused with the motive of extortion. What he said was,

> "Why did these employers make these payments? That is the important question. Well, you have to understand the industry. And you heard it from all of the witnesses. Murphy admitted to it. Nash talked about it. Other witnesses talked about it. When you need men, you call up the union hall and the union hall sends these men to these various construction jobs. Now, it is quite obvious. You have some good workers in that union hall and there are some very bad ones. And if you look at the contracts, you will see that the wage rate for the iron workers belonging to Local 580 are roughly $4 or $5 an hour.
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> Now, no employer, businessman, who is trying to make money can afford to pay $4 or $5 an hour to an incompetent. He needs a good man. He doesn't want to antagonize these two people because these people can give him a very rough time in their business. These witnesses for the government are businessmen. They want to make money, like you want to make money. You are businessmen also. And that brings up another point.
>
> These two men are still union officials. These employers have no stake whatsoever in antagonizing these two people. These two people have the power to send these employers poor workers day after day."

Appellants contend that these remarks were improper because (a) the Government is not allowed to show motive where it is not an element of the offense, and (2) the prosecutor's argument about motive was not based on any evidence in the record.

The first objection is incorrect as a matter of law; the Government may prove motive as circumstantial evidence that an offense was in fact committed even where such

proof might incidentally show the commission of another offense. *United States* v. *Houlihan*, 332 F. 2d 8, 14-15 (2 Cir.), *cert. denied*, 379 U. S. 828 (1964); *United States* v. *Johnson*, 254 F. 2d 175 (2 Cir.), *appeal dismissed*, 357 U. S. 533 (1958); *cf.*, 1 *Wigmore*, Evidence (3d ed. 1940) §118. The objection that the prosecutor's remarks about motive were unsupported by anything in the record is not fully sustainable. There was testimony about the mechanics of obtaining workers through the union hiring hall controlled by appellants; and common sense, which the jury is supposed to exercise, would say that it was more than likely that there were both good and poor workers. From these acts the prosecutor urged the jury to draw a somewhat tenuous inference; but it was not reversible error—particularly where it went only to motive and not directly to the ultimate issue of guilt or innocence.

The remaining instance concerns another portion of the argument for the Government in which the prosecutor said,

> "The immunity which was granted to these witnesses was granted by the Department of Labor. Now, *the Department of Labor isn't going to grant immunity if no crimes have been committed.* And the immunity relates to the testimony that the witnesses give. . . .
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> * * * * *
>
> Say you haven't committed a crime. What would be the sense of taking immunity if you hadn't committed a crime. If you hadn't committed a crime, you have nothing to worry about. But if you have committed a crime, you need immunity. But once having immunity—well, if you haven't committed a crime, you have nothing to worry about and you are cer-

> tainly not going to get immunity so that you can walk into court commit perjury, which is a serious crime.
>
> So *I think* the fact that each of these people received immunity shows that they did this crime, that these defendants received the moneys which the government witnesses admitted to." (Emphasis added.)

The appellants contend that the prosecutor thus improperly (a) expressed his own personal belief in the credibility of the Government witnesses, and (b) claimed that the granting of immunity to the four contractors by the Department of Labor was evidence of guilt on the part of the accused.

As a general rule a prosecutor may not express his personal belief in the testimony of witnesses. *United States* v. *White*, 324 F. 2d 814, 816 (2 Cir. 1963); *Greenberg* v. *United States*, 280 F. 2d 472 (1 Cir. 1960). However, the stray inclusion of the phrase "I think" in this portion of his argument hardly, if at all, constitutes an expression of his belief in the witnesses. It could not have been prejudicial, and it was not objected to below. See *United States* v. *Johnson*, 331 F. 2d 281 (2d Cir.), *cert. denied*, 379 U. S. 905 (1964).

The argument that the granting of immunity to the four contractors should be taken as evidence that the crimes had been committed was, of course, improper, but the prosecutor at that point was talking about the crimes committed by the contractors in paying the money; not about the guilt of the defendants. He argued that it was very unlikely that the contractors would have sought immunity if they hadn't committed the crimes and it was also unlikely that they would risk a charge of perjury by testifying to the commission of crimes that never occurred. These arguments

were presented to persuade the jury that it ought to believe the Government witnesses. He then went on to argue that the jury should believe that, as the contractors testified, the "defendants received the moneys."

In the course of presenting the evidence for the Government the prosecutor brought out that each employer was aware that his grant of immunity did not shield him from prosecution for perjury. It seems clear that the court and counsel in the case, at the time the summation for the Government was being made, took the prosecutor's remarks as directed toward the credibility of the four contractors. The trial judge did not intervene and there was no objection by defense counsel.

> "[C]ounsel for the defense cannot as a rule remain silent, interpose no objections, and after a verdict has been returned seize for the first time on the point that the comments to the jury were improper and prejudicial."

United States v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 238-239 (1940). Compare *United States* v. *Johnson, supra.*

We conclude that there is insufficient ground to warrant the ordering of a new trial even though we are of the opinion that the assistant district attorney should have shown greater care and restraint in arguing the matters of which the appellants complain.[4]

The judgments below are affirmed.

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[4] Neither of the Assistant United States Attorneys who represented the Government in this appeal, was the prosecutor at the trial.

APPENDIX B

Judgment of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the tenth day of March one thousand nine hundred and sixty-seven.

Present:

HON. HENRY J. FRIENDLY,
HON. ROBERT P. ANDERSON,
HON. WILFRED FEINBERG,

Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DANIEL MURPHY and ALBERT MENDES,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

/s/ A. DANIEL FUSARO
Clerk

APPENDIX C

Order of United States Court of Appeals Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the thirtieth day of March, one thousand nine hundred and sixty-seven.

Present:

HON. HENRY J. FRIENDLY,
HON. ROBERT P. ANDERSON,
HON. WILFRED FEINBERG,
Circuit Judges.

United States of America,

Plaintiff-Appellee,

v.

Daniel Murphy and Albert Mendes,

Defendants-Appellants.

A petition for rehearing together with a motion in the alternative to stay the issuance of the mandate and continue appellants' release on their own recognizance having been filed herein by counsel for the appellants,

Upon consideration thereof, it is

Appendix C—Order of United States Court of Appeals Denying Petition for Rehearing

Ordered that said petition for rehearing be and it hereby is denied.

Further ordered that the motion for a stay of the issuance of the mandate be and it hereby is granted and that the issuance of the mandate be and it hereby is stayed pursuant to and subject to the provisions of Rule 28(c) of the rules of this Court.

A. DANIEL FUSARO
Clerk

APPENDIX D

Order Extending Time to File Petition for Writ of Certiorari

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. .....

DANIEL MURPHY AND ALBERT MENDES,

Petitioners,

vs.

UNITED STATES

UPON CONSIDERATION of the application of counsel for petitioners,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 20th, 1967.

/s/ JOHN M. HARLAN
Associate Justice of the Supreme Court of the United States

Dated this 25th
day of April, 1967

APPENDIX E

Statutory and Constitutional Provisions Involved

Title 29, Section 186, United States Code

§ 186. Restrictions on payments and loans to employee representatives, labor organizations, officers and employees of labor organizations, and to employees or groups or committees of employees; exceptions; penalties; jurisdiction; effective date; exception of certain trust funds

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions,

decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b) (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in part II of the Interstate Commerce Act) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: *Provided,* That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

(c) The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer; (2) with

respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided,* That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided,* That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are

to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; or (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: *Provided,* That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds.

(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

(e) The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 381 of Title 28 (relating to notice to opposite party) to restrain violations of this section, without regard to the provisions of section 17 of Title 15 and section 52 of this title, and the provisions of sections 101-115 of this title.

(f) This section shall not apply to any contract in force on June 23, 1947, until the expiration of such contract, or until July 1, 1948, whichever first occurs.

(g) Compliance with the restrictions contained in subsection (c) (5) (B) of this section upon contributions to trust funds, otherwise lawful, shall not be applicable to contributions to such trust funds established by collective agreement prior to January 1, 1946, nor shall subsection (c) (5) (A) of this section be construed as prohibiting contributions to such trust funds if prior to January 1, 1947, such funds contained provisions for pooled vacation benefits. June 23, 1947, c. 120, Title III, § 302, 61 Stat. 157; Sept. 14, 1959, Pub.L. 86-257, Title V, § 505, 73 Stat. 537.

Appendix E—Statutory and Constitutional Provisions Involved

Title 18, Section 2, United States Code

§ 2. Principals

(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

(b) Whoever causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such.

United States Constitution, Fifth Amendment

AMENDMENT V—CAPITAL CRIMES: DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.